

**INTERLOCAL AGREEMENT
BETWEEN
THE CITY OF EVERETT AND PORT OF EVERETT REGARDING
IMPROVEMENTS TO PUGET SOUND OUTFALL 1**

This Interlocal Agreement ("**Agreement**") is dated for reference purposes _____, 2016, and is between the CITY OF EVERETT (the "**City**") and the PORT OF EVERETT (the "**Port**") (individually a "**Party**" and collectively the "**Parties**").

RECITALS

A. The City owns and operates Puget Sound Outfall No. 1 ("**PSO I**"). A portion of PSO 1 needs to be replaced, which portion is on Port property.

B. The Port is preparing to call for bids on a project near West Marine View Drive (the "**New Port Project**"). As part of this upcoming project, it would be efficient for the Port's contractor to install for the City the segment of PSO 1 pipe in 14th Street west of West Marine View Drive, which will carry combined sewer overflow, eventually connecting to the PSO 1 and PSO 2 (the "**New City Work**"). The New City Work is schematically shown in the attached Exhibit 1. The New City Work will be paid for solely by the City.

C. The City has provided to Port design and construction specifications for the New City Work, which the Port has approved (the "**New City Work Approved Plans and Specifications**"). The Parties have or shortly will have all permits necessary for the New City Work.

D. The purpose of this Agreement is for the City and Port to formalize their understandings regarding the New City Work/New Port Project.

AGREEMENT

The Parties agree as follows:

SECTION 1: NOT USED

SECTION 2: NEW CITY WORK

A. Not Used.

B. Not Used.

C. Procurement.

1. Construction Contract. After receipt of all necessary permits for the New City Work, the Port will call for bids and execute a construction contract for the New Port

Project (including the New City Work) in accordance with the Port's usual procurement processes and the Port's standard form construction contracts, except that:

(a) The New City Work will be a separate bid schedule in the New Port Project bid package. The bid package will inform bidders that the bid award will be determined based upon bidders' total bid amounts for the entire New Port Project, including the New City Work schedule. However, the bid package may also state that, if it is determined not to award the New City Work (see Section C.2 below), then the bid award will be determined based upon bidders' total bid amounts for the entire New Port Project, but not including the New City Work schedule.

(b) The contract will state that the New City Work may be removed from the project by unilateral deductive change order, in which case (i) the contract value will decrease by the amount of the New City Work Schedule and (ii) the contractor's entitlement to compensation for the removal of the New City Work from the project will be strictly limited to reimbursement for costs already directly incurred by the contractor for New City Work, such as purchased by contractor prior to the date of the deductive change order.

(c) The construction contract will contain a provision requiring the City be added as an additional insured on the contractor's required liability insurance policies.

(d) The construction contract will contain a clause acceptable to the City that allows the Port to assign all contractor's and manufacturer's warranties from the Port to the City.

2. Bidding Off-Ramps. Upon opening of the bids for construction of the New Port Project, the Parties will meet and confer.

(a) City Off-Ramp. If the City determines, in the exercise of its sole discretion, to not proceed with the New City Work, then the City may terminate Section 2 of this Agreement by delivering a written termination notice to the Port no later than two (2) days after the opening of such bids and the City's receipt of the bid results, in which case the Port will remove the New City Work schedule from the Port's New Port Project. In the event of such termination, the City will pay 100% of the costs incurred under Section 2 of this Agreement up to the date of termination and any other reasonable costs associated with the removing the New City Work from the New Port Project (e.g., engineering redesign services to accommodate the change, etc.).

(b) Port Off-Ramp. If the Port determines, in the exercise of its sole discretion, to not proceed with the New Port Project, then this Section 2 terminates. In the event of such termination, the Port will pay 100% of the costs incurred under Section 2 of this Agreement up to the date of termination.

D. Construction. The Port shall complete all New City Work in accordance with the New City Work Approved Plans and Specifications. The Port will coordinate with the City so that the City takes a lead role in the oversight and inspection of New City Work. The City may attend construction meetings. The Port without City approval may execute change orders to the

New City Work that in total increase the cost of the New City Work by up to 10% above the amount of the original New City Work construction contract. The Port will not execute change orders above such 10% without the prior approval of the City, which will not be unreasonably withheld.

E. Completion of New City Work. Upon completion of the New City Work, the City will promptly notify the Port that the New City Work is ready for acceptance. Upon such notice, (1) the Port will accept the New City Work from the contractor, (2) the New City Work is the property of the City, and (3) the City has responsibility for the maintenance and operation of the New City Work. The costs of such maintenance and operation will be allocated between the Parties by mutual agreement. The City and Port will cooperate to execute any documents (such as bills of sale) necessary to document the City's ownership interest in the New City Work and will cooperate to transfer to the City any contractor or manufacturer's warranties for the New City Work.

F. Permanent Easement. Upon completion of the New City Work, the City and Port will promptly execute a 30 foot wide permanent non-exclusive easement at no cost to the City for the New City Work in the form approved by the parties. Except for a provision substantively the same as Section 3 of this Agreement, the permanent easement will not contain any indemnity or defense obligations relating to environmental matters.

G. Cost Sharing.

1. City Pays for New City Work. Except in the case of an off-ramp termination by the Port, the City will pay all expenses related to the New City Work, including for example all surveying, designing, permitting, and construction costs. This includes all costs arising from or relating to any claims asserted against the Port by construction contractors relating to the New City Work. In the event of such a claim, the Parties will meet and confer, and the Port will not settle such a claim without the prior approval of the City, which will not be unreasonably withheld.

2. Staff Costs. Each party will bear the costs of its own staff work.

3. Billing Procedure. The Port will invoice the City for the New City Work. The Parties anticipate that the Port will invoice the City as the Port makes payments to New City Work consultants and contractors. An invoice will document in reasonable detail the amounts expended by the Port related to the New City Work. Upon completion and acceptance of the New City Work and resolution of contractor claims (if any), the Parties will true-up the payments, so that the City has paid 100% of the expenses related to the New City Work.

SECTION 3: ENVIRONMENTAL INDEMNITY

A. Indemnification by City. To the extent that the New City Work after completion of construction under Section 2.E above discharges directly and/or indirectly onto Port property or facilities, the City shall indemnify, defend, and hold harmless the Port and its employees, commissioners, representatives, tenants, invitees, agents and consultants (all such persons

collectively, "Port Persons"), from and against any and all claims, liabilities, loss, demands, liens, costs and expenses including reasonable attorneys' fees, agency orders, requirements or enforcement actions, suits and causes of action, and damages including but not limited to any claim for damage to property or injury or death of any persons (collectively, the "Claims") arising from the presence on Port property or any adjacent property of any Hazardous Substance (as that term is defined in Section 3.C. below) that was released onto, in or under the Port property from the New City Work after completion of construction under Section 2.E above. Notwithstanding the foregoing, the City shall not have any obligation to indemnify, defend or hold harmless Port Persons for any Claims arising from (1) Hazardous Substances released or allowed by Port Persons into PSO 2 or into the drainage area of PSO 2 or (2) Hazardous Substances released on Port property that enter into PSO 2, when such release is by any person other than the City; provided, that in the event the City asserts such limitations on its contractual indemnity apply, it shall have the burden of proof on the issue(s) of whether the exceptions to the City's indemnity responsibility are applicable. The parties agree that this Section A provides contractual indemnity, defense and hold harmless to the Port for discharges from the New City Work (such as, for one example, a break in the New City Work) and does not provide a contractual indemnity, defense or hold harmless for discharges from parts of PSO 1 that are not New City Work (such as, for one example, discharge from the end of PSO 1).

B. Not Used.

C. Definition of Hazardous Substance. As used in this Agreement, the term "Hazardous Substance" shall mean (i) any "hazardous substance" under the Washington Model Toxics Control Act (chapter 70.105D RCW) as amended from time to time and regulations promulgated thereunder; (ii) any substance the presence of which is prohibited by any federal, state, county, municipal or other local governmental statutes, regulations, ordinances or resolutions; and (iii) other substances deemed hazardous, toxic, a pollutant, or contaminant, which by any federal, state, county, municipal or other local governmental statutes, regulations, ordinances or resolutions require special handling or notification in its collection, storage, treatment or disposal.

SECTION 4: GENERAL PROVISIONS

A. Administration. Each Party to this Agreement shall serve as an administrator of this Agreement for the purposes of compliance with RCW 39.34.030 for each Party's respective actions in performance of this Agreement.

B. Duration/Expiration. This Agreement expires upon completion of the true-ups set forth in Section 2.G.3 above.

C. Governing Law. The laws of the State of Washington, without giving effect to principles of conflict of laws, govern all matters arising out of or relating to this Agreement.

D. Venue. The Parties shall bring any litigation arising out of or relating to this Agreement only before the Snohomish County Superior Court.

E. Complete Agreement. This Agreement constitutes the entire agreement of the

parties relating to the subject matter of this Agreement. This Agreement supersedes and replaces all other written or oral agreements thereto.

F. Amendment. No amendment to this Agreement will be effective unless in writing and signed by the Mayor of the City and by an authorized representative of the Port.

G. Waiver. No waiver of satisfaction of any condition or nonperformance of an obligation under this Agreement will be effective unless it is in writing and signed by the party granting the waiver, and no such waiver will constitute a waiver of satisfaction of any other condition or nonperformance of any other obligation.

H. Severability. If any provision of this Agreement is unenforceable to any extent, the remainder of this Agreement, or the application of that provision to any persons or circumstances other than those as to which it is held unenforceable, will not be affected by that unenforceability and will be enforceable to the fullest extent permitted by law.

I. Notice. For a notice under this Agreement to be valid, it must be in writing and the sending party must use one of the following methods of delivery: (A) personal delivery to the address stated below; (B) first class postage prepaid U.S. Mail to the address stated below; or (C) nationally recognized courier to the address stated below, with all fees prepaid.

Notice to City	Notice to Port
City of Everett Public Works Attn: Heather Griffin, P.E. 3200 Cedar St. Everett, WA 98201	Port of Everett Attn. Erik Gerking, P.G. 1200 Craftsman Way Everett, Washington 98206

A party may change its address by delivering written notice to the other party of the new address.

J. Attorneys Fees and Costs. The prevailing party in any action brought to enforce any obligations under this Agreement shall be entitled to recover from the non-prevailing party or parties an amount equal to the reasonable attorneys fees and costs incurred by the prevailing party, including without limitation any costs incurred on appeal or in any bankruptcy proceeding.

K. No Third-Party Beneficiaries. The provisions of this Agreement are for the sole benefit of the parties to this Agreement. No other persons have any rights or remedies under this Agreement.

L. Compliance with the Washington State Public Records Act. The parties acknowledge they are subject to the Public Records Act, chapter 42.56 RCW. Both parties shall cooperate with each other so that each may comply with all of its obligations under the Public Records Act.

M. Recording of this Agreement. This Agreement shall be recorded or otherwise made available to the public in accordance with RCW 39.34.040.

CITY OF EVERETT

By: _____
Ray Stephanson, Mayor

Date: _____

APPROVED AS TO FORM:

ATTEST:

James D. Iles, City Attorney
Date: _____

Sharon Fuller, City Clerk
Date: _____

PORT OF EVERETT

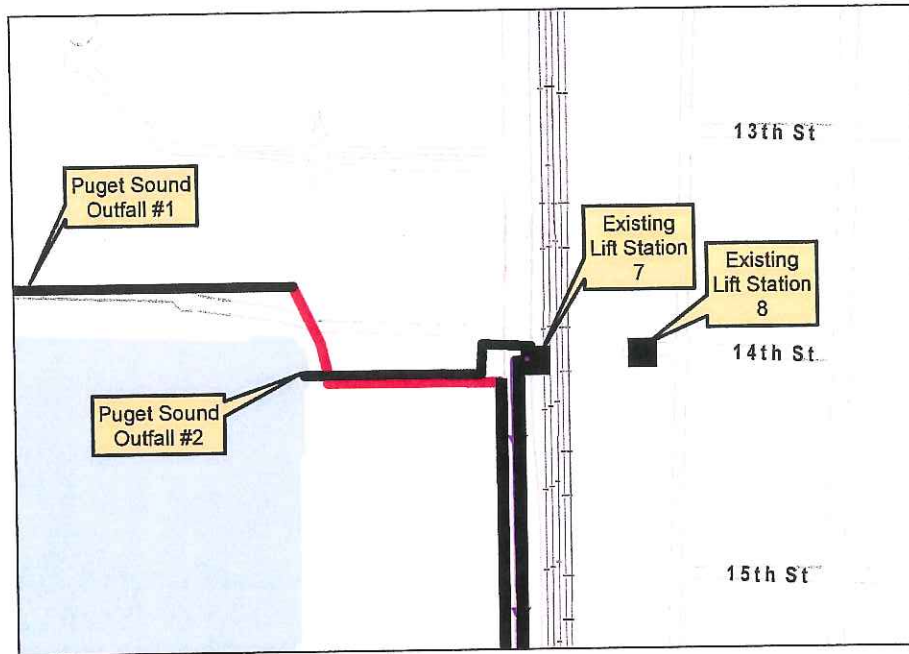
By: _____

Name: _____

Title: _____

Date: _____

EXHIBIT 1



The New City Work is in red.